Supreme Court, U.S.
FILED

No. 07-_____ 071001 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANGEL VELLON,

Petitioner,

v.

LOUIS FOLINO, SUPERINTENDENT, S.C.I. GREENE, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, THOMAS W. CORBETT, JR. ESQUIRE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court remand the matter to the District Court to allow Petitioner the opportunity to establish that equitable tolling saves his petition filed under 28 U.S.C. § 2254 from dismissal for violation of the one-year limitations filing period where the lawyer who filed the habeas petition did not have Petitioner sign it and never responded to entreaties from the lower courts or opposing counsel that he make a record for equitable tolling?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Angel Vellon, Louis Folino, Superintendent, S.C.I. Greene, the District Attorney of the County of Philadelphia, the Attorney General of the Commonwealth of Pennsylvania, Thomas W. Corbett, Jr., Esquire).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Angel Vellon respectfully prays that a writ of certiorari issue to remand the matter to the District Court to allow him the opportunity to establish that equitable tolling saves his petition filed under 28 U.S.C. § 2254 (§ 2254 petition) from dismissal for violation of the one-year limitations filing period.

OPINIONS BELOW

The November 7, 2007 Order of the Court of Appeals for the Third Circuit denying Petitioner a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(1), is unreported. (App. 1). The June 12, 2007 Order of the District Court dismissing the petition filed pursuant to 28 U.S.C. § 2254, is reported at 2007 WL 1725192 (E.D. Pa.) (App. 3); The Report and Recommendation dated April 26, 2007 of the Honorable Elizabeth T. Hey, United States Magistrate Judge, Eastern District of Pennsylvania, dismissing the petition filed pursuant to 28 U.S.C. § 2254, which is incorporated in the June 12, 2007 Order of the District Court, is also reported at 2007 WL 1725192 (E.D. Pa.) (App. 4).

JURISDICTION

This litigation began pursuant to an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court. Accordingly, the United States District Court for the Eastern District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 2254.

The Court of Appeals for the Third Circuit had appellate jurisdiction to review the final order of the District Court denying an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court conditioned upon the issuance of a certificate of appealability. 28 U.S.C. § 2253.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I § 9, cl. 2:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U.S.C. § 2254 is found at App. 13.

STATEMENT OF THE CASE

On November 13, 1998, Petitioner was convicted of first-degree murder, three counts of robbery, possessing an instrument of crime, and conspiracy by the Honorable Gary S. Glazer of the Court of Common Pleas of Philadelphia County, sitting without a jury. Petitioner was sentenced to life imprisonment for the murder conviction, and to a consecutive aggregate term of 37 ½ to 75 years of imprisonment on the remaining convictions.

Petitioner appealed to the Pennsylvania Superior Court, which affirmed the judgment on April 4, 2000. *Commonwealth v. Vellon*, 418 EDA 99 (Pa. Super. 2000). The Pennsylvania Supreme Court denied Petitioner an allowance of appeal on Augus. 31, 2000. *Commonwealth v. Vellon*, 275 EAL 2000 (Pa.).

On July 20, 2001,[1] Petitioner filed a *pro se* application for collateral relief pursuant of Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A.

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[1] The United States Magistrate Judge referenced August 14, 2001 as the date of filing in the Report and Recommendation. App. 5. In fact, Petitioner's PCRA petition was filed on July 20, 2001 when it was placed in the mail box at the state correctional institution in which he was incarcerated. *Commonwealth v. Plummer*, 798 A.2d 777, 778 n. 1 (Pa. Super.), *appeal denied*, 572 Pa. 702, 813 A.2d 840 (2002) (The prisoner mailbox rule provides that the date of delivery of the postconviction relief petition by the defendant to the proper prison authority or to a prison mailbox is considered the date of filing of the petition).

§ 9541 *et seq*. Counsel was retained[2] and filed an amended PCRA petition on August 2, 2002, raising ineffective assistance of trial counsel for (1) failing to ensure that his waiver of a jury trial was voluntary, knowing and intelligent; (2) impeding his right to testify on his own behalf; and (3) failing to interview and present potential character witnesses. The PCRA Court dismissed the petition without a hearing on January 29, 2003.[3]

Petitioner appealed the dismissal of the PCRA petitioner to the Pennsylvania Superior Court, raising the same three issues. On April 2, 2004, the Superior Court affirmed the denial of PCRA relief. *Commonwealth v. Vellon*, 618 EDA 2003 (Pa. Super. 2004). Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied on September 15, 2004. *Commonwealth v. Vellon*, No. 150 EAL 2004 (Pa.).

On November 17, 2006, an attorney retained by Petitioner's family filed a § 2254 raising the same three claims of ineffective assistance of trial counsel raised in his PCRA appeal. The lawyer did not bother to have Petitioner sign the § 2254 petition. *Vellon v. Folino, et al.*, No. 06-CV-5008. On March 2, 2007, Respondent filed an Answer asserting that the petition

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[2] PCRA counsel was not appointed, as indicated in the Report and Recommendation. App. 5.

[3] Not January 19, 2003 as reflected in the Report and Recommendation. App. 5.

was time-barred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, and that prior-counsel for petitioner had made no bid for equitable tolling. Indeed, after taking into account statutory tolling, the § 2254 petition was filed approximately 23 months beyond the one-year statute of limitations filing period. The lawyer never offered any evidence or other explanation in support of an equitable tolling argument even though Petitioner had written numerous letters to both the state and federal courts in which his case was pending inquiring about the status of the case and expressing a desire to comply with the timeliness requirements of the various filings.

In a Report and Recommendation dated April 26, 2007, the Honorable Elizabeth T. Hey, United States Magistrate Judge, Eastern District of Pennsylvania, dismissed the petition on the ground that it had been filed beyond the one-year limitation filing period set forth in 28 U.S.C. § 2244(d)(1) and that the lawyer for petitioner had made no effort to establish equitable tolling. App. 4-12. Petitioner's lawyer did not file objections to the Report and Recommendation pursuant to 28 U.S.C. § 636 which may have made a record in support of equitable tolling. The Honorable James T. Giles, United States District Court, Eastern District of Pennsylvania, approved and adopted the Report and Recommendation in an Order filed June 12, 2007 and dismissed the § 2254 petition without finding any basis for the issuance of a certificate of appealability. App. 3. In an Order dated November 7,

2007 of the United States Court of Appeals for the Third Circuit denied Petitioner's request for a COA to proceed with the appeal. App. 1-2.

REASON FOR GRANTING THE WRIT

This Court should remand the matter to the District Court to allow Petitioner the opportunity to establish that equitable tolling saves his petition filed under 28 U.S.C. § 2254 from dismissal for violation of the one-year limitations filing period where the lawyer who filed the habeas petition never had Petitioner sign it and never responded to entreaties from the court and opposing counsel that he make a record for equitable tolling

The right to appeal the dismissal of a § 2254 petition is governed by the requirements set forth in 28 U.S.C. § 2253(c), which provides in relevant part:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.] . . . A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

In the instant matter, the District Court never reached the merits of Petitioner's underlying constitutional claims because it dismissed his § 2254 petition on the procedural ground that his petition had not been timely filed within the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1), even taking into account statutory tolling.[4] App. 3.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court addressed the standards under which a COA should issue where a habeas petition has been dismissed on procedural grounds:

> . . . when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

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[4] The one-year limitations period is statutorily tolled, while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). By contrast, the one-year limitations period is not statutorily tolled (1) during the 90-day period a state prisoner may file a petition for a writ of certiorari to this Court from the denial of his state post-conviction petition, *Lawrence v. Florida*, 127 S. Ct. 1079 (2007); (2) where the state post-conviction petition has not been timely-filed, *Pace v. DiGuglielmo*, 544 U.S. 408 (2005); or (3) during the pendency of a previously filed federal habeas petition. *Duncan v. Walker*, 533 U.S. 167 (2001).

> constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. at 478.

It is readily apparent that Petitioner's § 2254 petition had not been timely filed within the one-year AEDPA limitations period. Petitioner's conviction became final on November 30, 2000, 90 days after the Supreme Court of Pennsylvania denied discretionary review. After taking into account statutory tolling authorized under 28 U.S.C. § 2244(d), a little less than 23 months had passed before the lawyer for Petitioner filed the § 2254 petition, unsigned by Petitioner, on November 17, 2006. Despite the fact that both opposing counsel and the Magistrate Judge alerted the lawyer to this procedural defect, the lawyer did nothing to make a record for equitable tolling, which, if accepted, would have enabled the lower courts to address the merits of Petitioner's substantive claims. Given that all the courts of appeals have found that equitable tolling exists under 28 U.S.C. § 2244(d), this Court should grant the writ of certiorari and remand the matter to the District Court to allow Petitioner to make his equitable tolling record.

The courts of appeals have uniformly held that equitable tolling is appropriate where a federal habeas petitioner in state custody fails to file the petition within one year of the end of direct review

due to circumstances other that those envisioned in the statutory tolling provisions contained in 28 U.S.C. § 2244(d).[5] See, e.g., *Neverson v. Farquharson*, 366 F.3d 32 (1st Cir. 2004); *Acosta v. Artuz*, 221 F.3d 117 (2nd Cir. 2000); *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616 (3rd Cir. 1998); *Egerton v. Cockrell*, 334 F.3d 433 (5th Cir. 2003); *Jihad v. Hvass*, 267 F.3d 803 (8th Cir. 2001); *Calderon v. United States Dist. Court*, 128 F.3d 1283 (9th Cir. 1997), *overruled on other grounds by Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 540-41 (9th Cir.) (*en banc*), *cert. denied*, 522 U.S. 1099 (1998); *Miller v. Marr*, 141 F.3d 976 (10th Cir. 1998); *Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001), *cert. denied*, 534 U.S. 1144 (2002). This view is grounded in the language of AEDPA which refers to the one year as a "period of limitation" and a "limitation period," and does not use the term "jurisdiction." *Calderon v. United States Dist. Court*, 128 F.3d at 1288.

Although this Court has not yet explicitly decided whether § 2244(d) allows for equitable tolling, it assumed its applicability in *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). *Lawrence* and *Pace* suggest that to be entitled to equitable tolling, a habeas petitioner

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[5] By contrast, time limitations which are considered jurisdictional in nature cannot be modified and operate as an absolute bar for non-compliance. *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *Lawrence*, 127 S. Ct. at 1085 quoting *Pace v. DiGuglielmo*, 544 U.S. at 418.[6] In applying these standards, the Court in *Lawrence* did not find equitable tolling in cases involving counsel's mistake in miscalculating the limitations period: "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling. . . ." *Lawrence* at 1085. Similarly, a habeas petitioner was not entitled to equitable tolling of the one-year limitations period during the period his untimely state post-conviction relief petition was pending in state courts, where the claims petitioner set forth in his state petition were available to him for several years before he filed his state petition, and he waited an additional five months after his state petition was rejected before presenting those claims in federal habeas petition. *Pace v. DiGuglielmo*, 544 U.S. at 418.

By contrast, equitable tolling has been found by the courts of appeal in various contexts. See, e.g., *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005) (equitable tolling involving credible claim of actual innocence); *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003) (misconduct of habeas petitioner's attorney was

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[6] In a non-habeas context, this Court has found equitable tolling "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

sufficiently egregious to justify equitable tolling of the one-year federal habeas limitations period where the attorney was hired nearly a full year in advance of the deadline for filing a petition, but completely failed to prepare and file a petition despite the fact that petitioner and his mother contacted him numerous times, by telephone and in writing, seeking action, and where, despite a request that he return petitioner's file, the attorney retained it for the duration of the limitations period and more than two months beyond); *York v. Galetka*, 314 F.3d 522 (10th Cir. 2003) (equitable tolling allowed where application of *Duncan v. Walker*, 533 U.S. 167 (2001), excluding prior federal habeas petitions from statutory tolling, would have been unfair given the contrary status of the law in the circuit at the time of the current habeas filing); *Fahy v. Horn*, 240 F.3d 239, 244 (3rd Cir.), *cert. denied*, 534 U.S. 944 (2001) (recognizing that, in context of capital habeas review, egregious conduct of counsel will merit equitable tolling); *Calderon v. U.S. Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) *overruled on other grounds by Calderon v. U.S. Dist. Court (Kelly)*, 163 F.3d 530, 540-41 (9th Cir. 1998) (*en banc*) (holding that AEDPA's statute of limitations was equitably tolled when the petitioner's counsel unexpectedly moved out of the state and left an unusable work product behind for replacement counsel). See generally, *Equitable Tolling of AEDPA*, 19 A.L.R. Fed. 2nd 491 (2007); *Equitable Tolling of AEDPA*, 17 A.L.R. Fed. 2nd 397 (2007).

In the instant case, the lawyer for petitioner who filed the § 2254 petition without having Petitioner sign it was put on notice by the respondent that the only way Petitioner could avoid dismissal of his § 2254 petition for violation of the one-year statute of limitations was to make a record for equitable tolling. Indeed, U.S. Magistrate Judge Hey's Report and Recommendation also notes prior-counsel's utter failure to present any evidence of equitable tolling.

> Petitioner presents the Court with no evidence that he was prevented in any way from filing a timely habeas petition. Indeed, the counseled petition makes no reference whatsoever to untimeliness, and Petitioner did not file any response to the Commonwealth's statute of limitations argument.

App. 10-11. Petitioner recognizes that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). However, egregious conduct on the part of counsel can trigger equitable tolling of the limitations filing period. See *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003). Such egregious conduct exists in the instant case because the lawyer for Petitioner submitted a § 2254 petition which had not been signed and attested to by Petitioner, never responded to entreaties from opposing counsel and the lower court to make a record for equitable tolling where it was obvious that the § 2254 petition had been filed well beyond the one-year limitations filing period and

never corrected obvious mistakes in the Report and Recommendation such as the date Petitioner filed his state post-conviction petition and the date that post-conviction petition had been denied by the state court.

If given the opportunity to establish equitable tolling, Petitioner is prepared to present correspondence he wrote to the Clerk of the District Court at least eight months before the lawyer filed the § 2254 petition expressing concern about the timeliness of his § 2254 petition. Petitioner is also prepared to introduce other letters he wrote to the clerks in the various state courts where his case was pending asking about the status of his case. These letters will show that Petitioner acted with diligence and dispatch to protect his rights, and that evidence existed for the lawyer who filed the § 2254 petition to make a record of equitable tolling. The lawyer's failure to do so was so egregious that this Court should remand to the District Court to allow Petitioner to make his showing of equitable tolling.

CONCLUSION

For the forgoing reasons, Petitioner Angel Vellon prays that this Court grant his petition for a writ of certiorari to remand the matter to the District Court to allow Petitioner the opportunity to establish that equitable tolling saves his petition filed under 28

U.S.C. § 2254 from dismissal for violation of the one-year limitations filing period.

Respectfully submitted,

MARK S. GREENBERG, ESQUIRE
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215-735-5900
Attorney for Petitioner

ALD-30 **October 25, 2007 [sic]**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **07-3079**

ANGEL VELLON

VS.

LOUIS FOLINO; ETC.

(E.D. PA. CIV. NO. 06-cv-05088)

Present: SLOVITER, FISHER and HARDIMAN, *Circuit Judges*

Submitted is appellant's notice of appeal which may be treated as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above captioned case.

Respectfully,

MMW/SRF/isc Clerk

ORDER

We treat appellant's notice of appeal as a request for a certificate of appealability; so treated, it is denied. Jurists of reason could not debate that the district court properly dismissed appellant's 28 U.S.C. § 2254 habeas petition as untimely filed. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Further, statutory tolling cannot save appellant's petition from dismissal, and appellant has made no credible showing with regard to equitable tolling.

See Jones v. Morton, 195 F.3d 153, 159-60 (3d Cir. 1999).

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: November 7, 2007
ISCIcc: Angel Vellon
John W. Goldsborough, Esq.

Received and Filed

11/7/07 – isc
Marcia M. Waldron,
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGEL VELLON	:	CIVIL ACTION
v.	:	No. 06-5088
LOUIS FOLIGNO [sic], et al.	:	(Filed Jun. 12, 2007)

ORDER

AND NOW, this 11th day of June, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, and any objections made thereto, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition filed pursuant to 28 U.S.C. § 2254 is DISMISSED.
3. There is *no* basis for the issuance of a certificate of appealability.

BY THE COURT:

/s/ James T. Giles
JAMES T. GILES, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGEL VELLON	:	CIVIL ACTION
v.	:	
LOUIS FOLINO, et al.	:	No. 06-5088

REPORT AND RECOMMENDATION

ELIZABETH T. HEY
UNITED STATES
MAGISTRATE JUDGE

April 26, 2007

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 on behalf of Angel Vellon ("Petitioner"), an individual currently incarcerated in State Correctional Institute-Greene ("SCI-Greene") in Waynesburg, Pennsylvania. For the reasons that follow, I recommend that the petition be dismissed.

I. FACTS AND PROCEDURAL HISTORY

On November 13, 1998, following a two-day capital bench trial before the Honorable Gary S. Glazer of the Court of Common Pleas of Philadelphia County, petitioner was convicted of first-degree murder, three counts of robbery, possessing an instrument of crime, and conspiracy.[1] Judge Glazer

[1] The charges arose from the shooting death of Dong Kim in Philadelphia, Pennsylvania, on the afternoon of February 6, 1997.

subsequently sentenced Petitioner to life imprisonment for the murder conviction, and to a consecutive aggregate term of 37½ to 75 years of imprisonment on the remaining convictions.

Petitioner appealed to the Pennsylvania Superior Court, which affirmed the judgments on April 4, 2000. *Commonwealth v. Vellon*, 418 EDA 99 (Pa. Super. April 4, 2000). Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied on August 31, 2000. *Commonwealth v. Vellon*, 275 E.D. ALLOC 2000 (Pa. Aug. 31, 2000).

On August 14, 2001 [sic], Petitioner filed a *pro se* application for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 *et seq*. Counsel was appointed and filed an amended PCRA petition on August 2, 2002, raising ineffective assistance of trial counsel for (1) failing to ensure that his waiver of a jury trial was voluntary, knowing and intelligent; (2) impeding his right to testify on his own behalf; and (3) failing to interview and present potential character witnesses. The PCRA Court dismissed the petition without a hearing on January 19 [sic], 2003.

Petitioner appealed to the Pennsylvania Superior Court, raising the same three issues. On April 2, 2004, the Superior Court affirmed the denial of PCRA relief. *Commonwealth v. Vellon*, 618 EDA 2003 (Pa. Super. April 2, 2004). Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme

Court, which was denied on September 15, 2004. *Commonwealth v. Vellon*, No. 150 E.A.L. 2004 (Pa. 2004).

On November 17, 2006, Petitioner filed the present counseled petition for writ of habeas corpus, raising the same three claims of ineffective assistance of trial counsel raised in his PCRA petition and appeal. On March 2, 2007, Respondents filed an Answer asserting that the petition is time-barred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

II. DISCUSSION

A. AEDPA's One-Year Statute of Limitations

Section 101 of AEDPA, effective April 24, 1996, amended federal habeas corpus law by imposing a one-year limitation period to an application for a writ of habeas corpus filed by a person in state custody. 28 U.S.C.A. § 2244(d)(1). Section 2244, as amended, provides that the one-year limitation period shall run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant

> was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

In the instant case, the applicable starting point for the statute of limitations is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Swartz v. Meyers*, 204 F.3d 417, 419 (3d Cir. 2000). Petitioner's conviction became final on November 29, 2000, when the time allowed for filing a petition for a writ of *certiorari* to the United States Supreme Court expired. *See* Supreme Court Rule 13(1) (petitioner has 90 days to file petition for *certiorari*); *Kapral v. United States*, 166 F.3d 565, 575 (3d Cir. 1999) (same). As a result, Petitioner had until November 29, 2001, plus any time during which the limitations period was tolled, to file his federal habeas petition.

B. Statutory Tolling

Section 2244 provides that "the time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation. . . . " 28 U.S.C. § 2244(d)(2). Here, Petitioner's one-year period for filing a federal habeas petition commenced running on November 30, 2000, and continued to run until it was tolled by the filing of Plaintiff's PCRA petition on August 14, 2001. At that time, 258 days had run on the one-year limitations period, and 107 days remained. *See id.*; *see also Lovasz v. Vaughn*, 134 F.3d 146, 148-149 (3d Cir. 1998) (finding AEDPA tolled by "properly filed application" for collateral review in state courts). Petitioner's PCRA petition was pending in the state courts from August 14, 2001, until September 15, 2004, when the Pennsylvania Supreme Court declined discretionary review of the order denying his PCRA petition.[2] Therefore, the AEDPA limitations period resumed on September 15, 2004, and Petitioner had 107 days – or until December 31, 2004 – to file a timely habeas petition. Because Petitioner did not file the present petition until November 15, 2006, he is barred from presenting his claims under section

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[2] The 90-day period during which a state prisoner may file a petition for a writ of *certiorari* in the United States Supreme Court from the denial of his state post-conviction petition does not toll the AEDPA limitations period. *Lawrence v. Florida*, ___ U.S. ___, 2007 WL 505972 (2007). Nevertheless, tolling during that period would not make this petition timely.

2254, unless the petition is subject to equitable tolling.

C. Equitable Tolling

The United States Supreme Court has not decided whether equitable tolling is available in the context of a federal habeas petition. *See Lawrence*, 2007 WL 505972, at *6 ("We have not decided whether § 2244(d) allows for equitable tolling . . . [We] assume without deciding that it is"). The Third Circuit, however, has ruled that the one-year period of limitation for section 2254 is subject to equitable tolling because this limitation period is a statute of limitations and not a jurisdictional bar. *See Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 618 (3d Cir. 1988).

Equitable tolling is proper in this Circuit only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." *Id.* (citation omitted). "The petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' Mere excusable neglect is not sufficient." *Id.* at 618-19 (citations omitted).[3] The

[3] These standards are consistent with anticipated Supreme Court standards. For example, in assuming that equitable tolling is available, the United States Supreme Court recently stated that a litigant bears the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his

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Third Circuit has identified four circumstances in which equitable tolling is justified: (1) when the defendant has actively misled the plaintiff; (2) when the plaintiff has in some extraordinary way been prevented from asserting his rights; (3) when the plaintiff has timely asserted his rights, but has mistakenly done so in the wrong forum; or (4) when the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that he had done everything required of him. *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999). Equitable tolling is to be invoked "only sparingly." *See United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998). "In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001).

I do not find the instant matter to be one of those "rare situation[s] where equitable tolling is demanded by sound legal principals as well as the interests of justice." *See Jones*, 195 F.3d at 159 (quoting *Midgley*, 142 F.3d at 179). Petitioner presents the Court with no evidence that he was prevented in any way from filing a timely habeas petition. Indeed, the counseled petition makes no

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way." *Lawrence*, 2007 WL 505972, at *6 (citing *Pace*, 544 U.S. at 418).

reference whatsoever to untimeliness, and Petitioner did not file any response to the Commonwealth's statute of limitations argument. Moreover, there is no evidence that Petitioner diligently pursued his claims between the time he was denied PCRA review in the Pennsylvania Supreme Court and the time the present petition was filed. This failure is underscored by the fact that the present petition raises the same three claims of ineffective assistance of counsel that were raised in the PCRA appeal. Because Petitioner has not established "extraordinary" circumstances which would justify application of equitable principles, this court finds that there are no circumstances which would make the rigid application of the limitation period unfair.

III. CONCLUSION

As set forth above, the one-year statute of limitations began to run when Petitioner's conviction became final on November 29, 2000. It was thereafter tolled from August 14, 2001, until September 15, 2004, during the pendency of his state PCRA proceedings. Because I conclude that equitable tolling does not apply, there was no further tolling of the limitation period. Consequently, the one-year limitation period expired on December 31, 2004, and the present petition, filed on November 17, 2006, is untimely.[4]

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[4] I further find that a Certificate of Appealability ("COA") is unwarranted. Pursuant to Local Appellate Rule 22.2 of the

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Therefore, I make the following:

RECOMMENDATION

AND NOW, this 26th day of April, 2007, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be DISMISSED. There has been *no* substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability.

/s/ Elizabeth T. Hey
ELIZABETH T. HEY
UNITED STATES
MAGISTRATE JUDGE

Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a COA should issue. Where the petition is untimely or otherwise procedurally defective, a COA is not warranted unless the petitioner demonstrates that reasonable jurists would: (1) "find it debatable whether the petition states a valid claim of the denial of a constitutional right;" and (2) "whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where, as here, a plain procedural bar is present, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

Sec. 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true

and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.